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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 120717247-2533-01]

RIN 0648-BC37

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic;
Reef Fish Fishery of the Gulf of Mexico; Amendment 38

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes to implement management measures described in Amendment 38 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP) prepared by the Gulf of Mexico (Gulf) Fishery Management Council (Council). If implemented, this rule would modify post-season accountability measures (AMs) that affect shallow-water grouper species (SWG), change the trigger for AMs, and revise the Gulf reef fish framework procedure. The intent of this proposed rule is to achieve optimum yield (OY) while ensuring the fishery resources are utilized efficiently.

DATES: Written comments must be received on or before [insert date 30 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: You may submit comments on the proposed rule identified by "NOAA-NMFS-2012-0149" by any of the following methods:

- Electronic submissions: Submit electronic comments via the Federal e-Rulemaking Portal:
<http://www.regulations.gov>. Follow the "Instructions" for submitting comments.
- Mail: Steve Branstetter, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter N/A in the required field if you wish to remain anonymous).

To submit comments through the Federal e-Rulemaking Portal: <http://www.regulations.gov>, enter "NOAA-NMFS-2012-0149" in the search field and click on "search." After you locate the proposed rule, click the "Submit a Comment" link in that row. This will display the comment web form. You can then enter your submitter information (unless you prefer to remain anonymous),

and type your comment on the web form. You can also attach additional files (up to 10 MB) in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Comments received through means not specified in this rule will not be considered.

For further assistance with submitting a comment, see the "Commenting" section at <http://www.regulations.gov/#!faq> or the Help section at <http://www.regulations.gov>.

Electronic copies of Amendment 38, which includes an environmental assessment, fishery impact statement, regulatory flexibility act analysis, and a regulatory impact review, may be obtained from the Southeast Regional Office Web Site at <http://sero.nmfs.noaa.gov/sf/GrouperSnapperandReefFish.htm>.

FOR FURTHER INFORMATION CONTACT: Steve Branstetter, Southeast Regional Office, NMFS, telephone: 727-824-5305; email: Steve.Branstetter@noaa.gov.

SUPPLEMENTARY INFORMATION: The reef fish fishery of the Gulf is managed under the FMP. The FMP was prepared by the Council and is implemented through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

Background

The Magnuson-Stevens Act requires NMFS and regional fishery management councils to prevent overfishing and achieve, on a

continuing basis, the OY for federally managed fish stocks. The reauthorized Magnuson-Stevens Act, as amended through January 12, 2007, requires the councils to establish annual catch limits (ACLs) for each stock/stock complex and AMS to ensure these ACLs are not exceeded. The intent of this proposed rule is to modify post-season recreational AMS for SWG species (i.e., gag, red grouper, black grouper, scamp, yellowfin grouper, and yellowmouth grouper) and allow modifications to AMS for FMP species in the future under the FMP framework procedure to achieve OY while ensuring the fishery resources are utilized efficiently.

Through Amendment 30B to the FMP (74 FR 17603, April 16, 2009), NMFS established AMS for gag and red grouper. These AMS included a provision that if the recreational sector ACL for gag or red grouper is exceeded in the current year, the recreational season for all SWG is shortened the following year to ensure that the gag or red grouper recreational sector ACL is not exceeded again the following year. Regulations implemented through Amendment 32 to the FMP (77 FR 6988, February 10, 2012) added more AMS, including in-season closures for gag and red grouper, and overage adjustments for gag and red grouper if they are overfished.

Management Measures Contained in this Proposed Rule

If implemented, this rule would modify post-season AMs for SWG species, change the trigger for AMs, and revise the Gulf reef fish framework procedure. This rule would modify the post-season AMs for gag and red grouper so that the shortening of the season following a season with an ACL overage applies only to the species with landings that exceeded the ACL the prior year. Modifying the AMs would improve the likelihood of achieving OY for red grouper and avoid unnecessary closures of all SWG species (i.e., gag, red grouper, black grouper, scamp, yellowfin grouper, and yellowmouth grouper).

The current method for determining if post-season AMs have been triggered for red grouper or gag is to compute a 1 to 3-year moving average of recreational landings, and to compare that moving average of landings to the ACL. However, the use of a moving average has not been practicable due to the frequent changes that have occurred in the ACLs. In addition, the use of moving averages could potentially delay the implementation of AMs by unduly masking sizeable harvest overages and potentially slowing down the recovery of stocks under rebuilding. This rule would remove the 3-year moving average, allowing AMs to be based on a comparison of the ACL to the current year's landings. A simple comparison of the current year's landings to the ACL could provide greater protection to the gag and red grouper

stocks, be easier for fishermen to understand, and be less burdensome to administer.

This rule proposes to revise the list of management measures contained in the regulations that may be established or modified by the framework procedure specified in the FMP to match those that are contained in the FMP. Amendment 38 would add a list of the AMs that may be revised through the Gulf reef fish framework process. Typically, the process for implementing framework actions take less than a year and the actions are effective until amended. Changes to AMs through the framework may result in faster implementation of measures beneficial to fish stocks and fishery participants. No changes to the regulatory text are required to implement the action to add AMs to the framework process because NMFS previously erroneously included AMs in § 622.48(d) in the rule implementing the Generic ACL Amendment (76 FR 82044, December 29, 2011). Sale and purchase restrictions, and transfer at sea provisions were also previously erroneously included in the rule implementing the Generic ACL Amendment. Thus, NMFS proposes to remove these two items from the list in § 622.48(d). NMFS also proposes removing total allowable catch (TAC) from § 622.48(d). Total allowable catch has been included in the regulations since the adjustment of management measures was first codified in 1992 (57 FR 11914,

April 8, 1992). With the implementation of ACLs and ACTs, TAC is no longer used in the management of Gulf reef fish.

Additional Measure Contained in Amendment 38

Amendment 38 would also update language in the framework procedure related to Council advisory panels and committees. More general language in reference to Council committees and advisory panels would replace specific references that are no longer accurate.

Other Changes not contained in Amendment 38

In § 622.49, paragraphs (a)(4)(ii)(C) and (a)(5)(ii)(C), NMFS proposes to clarify language regarding the management of an ACL overage. Currently, if gag or red grouper are overfished and the ACL is exceeded, NMFS deducts the overage from the ACL established for the following year and from the ACT, as determined in § 622.49, paragraph (a)(4)(ii)(B) or (a)(5)(ii)(B). This means that the overage could be deducted from the ACT of the prior fishing year, if the ACT is maintained the following fishing year. Conversely, the overage could be deducted from the following year's ACT if the best scientific information available determines that maintaining the prior year's ACT is unnecessary. This process was not made express in the final rule for Amendment 32 to the FMP (77 FR 6988, February 10, 2012); however, this is consistent with not allowing the ACT to increase above the ACL after an overage occurs, maintains a

larger buffer between the ACT and ACL when an overage occurs, and was the intent of Amendment 32. Thus, NMFS proposes to amend the regulations to expressly state that the ACT referred to in § 622.49, paragraphs (a)(4)(ii)(C) and (a)(5)(ii)(C), is the ACT as determined in § 622.49, paragraph (a)(4)(ii)(B) or (a)(5)(ii)(B).

NMFS also proposes to delete the following sentence in the regulations at § 622.49, paragraph (a)(4)(ii)(A) and move it to paragraph (a)(4)(ii)(B): "In addition, the notification will reduce the length of the recreational gag fishing season the following fishing year by the amount necessary to ensure gag recreational landings do not exceed the recreational ACT in the following fishing year." This change will keep only in-season AMS in paragraph (a)(4)(ii)(A) and include the post-season AMS in paragraph (a)(4)(ii)(B).

Additionally, NMFS identified an inadvertent inconsistency between the regulatory text in the proposed rule for Amendment 32 to the FMP (76 FR 67656, November 2, 2011) and the second proposed rule for Amendment 32 to the FMP (77 FR 1910, January 12, 2012). To correct this mistake, in § 622.49, paragraph (a)(4)(ii)(B), NMFS revises the phrase "If gag are not overfished" to read "Without regard to overfished status," and in paragraph (a)(5)(ii)(B), NMFS revises the phrase "If red

grouper are not overfished" to read "Without regard to overfished status."

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the AA has determined that this proposed rule is consistent with Amendment 38, the Magnuson-Stevens Act and other applicable law, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if implemented, would not have a significant economic impact on a substantial number of small entities. The factual basis for this determination is as follows:

The purpose of this proposed rule is to modify post-season recreational AMs for SWG and allow modifications to AMs for Gulf reef fish species in the future under the FMP framework procedure to achieve OY while ensuring the fishery resources are utilized efficiently. The Magnuson-Stevens Act provides the statutory basis for this proposed rule.

This rule, if implemented, is expected to directly affect 1,376 vessels that possess a reef fish for-hire permit. The for-hire fleet is comprised of charter vessels, which charge a

fee on a vessel basis, and headboats, which charge a fee on an individual angler (head) basis. The average charter vessel is estimated to earn approximately \$76,000 (2009 dollars) in annual revenue, while the average headboat is estimated to earn approximately \$230,000 (2009 dollars).

No other small entities are expected to be directly affected by this proposed rule.

The Small Business Administration has established size criteria for all major industry sectors in the U.S., including fish harvesters. A business involved in the for-hire fishing industry is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of \$7.0 million (NAICS code 713990, recreational industries). Based on the average revenue estimates provided above, all for-hire vessels expected to be directly affected by this proposed rule are determined for the purpose of this analysis to be small business entities.

Neither of the two actions considered in Amendment 38 and included in this proposed rule are expected to result in any reduction in profit for any small entities. One action would modify the FMP framework procedure, while the other action would revise the post-season AMs for SWG species. The proposed modifications to the FMP framework procedure would expand the

range of management actions that could be taken under framework procedures and improve the opportunity to access quality advice during the management process. Expanding the range of management actions that could be taken under framework procedures is expected to result in more responsive and efficient management change, when necessary.

The current framework narrowly defines the groups that can provide recommendations to the Council on proposed framework actions. The proposed modification would broaden this definition, thereby potentially allowing more expert participation to inform the management process. As a result, this action is expected to result in better and timelier management decisions and increased economic benefits to small entities that harvest reef fish. However, modifying the FMP framework procedure is an administrative action that only indirectly affects small entities. Such entities would be directly affected through future management actions taken under the new framework procedures. Any affects would be analyzed in those rulemaking actions. As a result, because the effects on small entities of implementing this action are indirect, this component of the proposed rule is outside the scope of the Regulatory Flexibility Act (RFA).

Accountability measures are intended to ensure harvest overages do not occur and to correct or mitigate for overages if

they do occur. Post-season AMs are invoked only if a harvest overage occurs. Although implementing AMs is expected to result in direct economic effects on affected small entities, the establishment of AMs, or their modification, are administrative actions that are expected to have only indirect effects on any small entities. Direct affects of implementing AMs would be accounted for in any rulemaking actions applying the AMs. Because the proposed action would only modify the current AMs, no direct effects are expected to accrue to any small entities. As a result, this component of the proposed rule is also outside the scope of the RFA.

However, because implementing post-season AMs is expected to restrict fishing operations and result in direct short-term reductions in revenue and profit, further discussion of the potential significance of these effects is provided. The proposed modification to the AMs is expected to result in less restrictive measures than the current AMs, by supporting more timely response to harvest overages and limiting any necessary corrective harvest restrictions to just gag or red grouper, rather than imposing restrictions on fishing for all species in the SWG complex. As a result, the proposed modification is expected to result in lower short-term adverse economic effects on small entities than the current AMs. More timely response to harvest overages is also expected to limit resource harm and

reduce the scope of necessary corrective action, thereby reducing the magnitude of any short-term adverse economic effects and better preserving the long-term economic benefits to small entities. Limiting corrective action to the harvest of gag or red grouper allows the fleet to continue fishing for and harvesting other SWG species, along with the continued economic benefits associated with these activities. As a result, the proposed changes to the AMs are expected to increase economic benefits to small entities relative to the status quo.

While NMFS expects the modifications to the AMs will benefit the affected entities, any change is expected to be minor relative to the affected vessels' overall fishing effort. Based on 2005-2009 recreational data, an average of only approximately 2.5 percent of charter vessel anglers reported targeting any SWG species. Gag and red grouper are the dominant target species in the SWG complex, and account for approximately two percent and one percent of charter vessel individual angler trips, respectively (overlap prevents summing of these, and subsequent, percentages). Between 2005 and 2009, on trips where charter vessels targeted SWG species, they targeted gag grouper approximately 99 percent of the time, and red grouper 98 percent of the time. In other words, if both gag and red grouper are removed from the list of targeted SWG species, less than one tenth of one percent of charter vessel anglers reported

targeting any of the remaining SWG species (i.e., Other SWG). Similar data are not available for headboat anglers because information on target intent is not collected for this sector. However, for the purpose of this analysis, target behavior in the charter vessel component of the recreational sector is used as a proxy for target behavior in the headboat component of the recreational sector. While some individual vessels may be more dependent on the subject species, these results indicate that, for the average small entity that may be affected by this proposed rule, any economic effects are marginal. Additionally, these results represent annual target rates. Because any AM implemented will only affect the fishing for a portion of the year, the likelihood that any economic effects would be significant is further reduced.

In addition to the two actions considered in Amendment 38 and included in this proposed rule, this proposed rule would make three changes to the regulatory text in § 622.49. These proposed changes are described in the preamble. These changes clarify language associated with prior regulatory action and better meet the intent of the Council's actions in Amendment 32 to the FMP. As a result, none of these proposed changes in the regulatory text would be expected to result in any reduction in profits to any small entities. Based on the discussion above, NMFS determines that this rule, if implemented, will not have a

significant economic effect on a substantial number of small entities. As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

This proposed rule does not establish any new reporting, record-keeping, or other compliance requirements.

List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Reporting and recordkeeping requirements, Virgin Islands.

Dated: October 15, 2012.

Alan D. Risenhoover, Director, Office of Sustainable Fisheries,
performing the functions and duties of the Deputy Assistant Administrator for Regulatory
Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 622 is proposed to be amended as follows:

PART 622--FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

1. The authority citation for part 622 continues to read as follows:

Authority: 16 U.S.C. 1801 et seq.

2. In § 622.48, paragraph (d) is revised to read as follows:

§ 622.48 Adjustment of management measures.

* * * * *

(d) Gulf reef fish. For a species or species group: reporting and monitoring requirements, permitting requirements, bag and possession limits (including a bag limit of zero), size limits, vessel trip limits, closed seasons or areas and reopenings, annual catch limits (ACLs), annual catch targets (ACTs), quotas (including a quota of zero), accountability measures (AMs), MSY (or proxy), OY, management parameters such as overfished and overfishing definitions, gear restrictions (ranging from regulation to complete prohibition), gear markings and identification, vessel markings and identification, allowable biological catch (ABC) and ABC control rules, rebuilding plans, and restrictions relative to conditions of harvested fish (maintaining fish in whole condition, use as bait).

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3. In § 622.49, paragraphs (a)(4)(ii), (a)(5)(ii)(B), (a)(5)(ii)(C), and (a)(5)(ii)(D) are revised to read as follows:

§ 622.49 Annual Catch limits (ACLs) and accountability measures (AMs).

(a) * * *

(4) * * *

(ii) * * *

(A) Without regard to overfished status, if gag recreational landings, as estimated by the SRD, reach or are projected to reach the applicable ACLs specified in paragraph (a)(4)(ii)(D) of this section, the AA will file a notification with the Office of the Federal Register, to close the recreational sector for the remainder of the fishing year. On and after the effective date of such a notification, the bag and possession limit of gag in or from the Gulf EEZ is zero. This bag and possession limit applies in the Gulf on board a vessel for which a valid Federal charter vessel/headboat permit for Gulf reef fish has been issued, without regard to where such species were harvested, i.e. in state or Federal waters.

(B) Without regard to overfished status, and in addition to the measures specified in paragraph (a)(4)(ii)(A) of this section, if gag recreational landings, as estimated by the SRD, exceed the applicable ACLs specified in paragraph (a)(4)(ii)(D) of this section, the AA will file a notification with the Office of the Federal Register to maintain the gag ACT, specified in paragraph (a)(4)(ii)(D) of this section, for that following fishing year at the level of the prior year's ACT, unless the best scientific information available determines that maintaining the prior year's ACT is unnecessary. In addition,

the notification will reduce the length of the recreational gag fishing season the following fishing year by the amount necessary to ensure gag recreational landings do not exceed the recreational ACT in the following fishing year.

(C) If gag are overfished, based on the most recent status of U.S. Fisheries Report to Congress, and gag recreational landings, as estimated by the SRD, exceed the applicable ACL specified in paragraph (a)(4)(ii)(D) of this section, the following measures will apply. In addition to the measures specified in paragraphs (a)(4)(ii)(A) and (B) of this section, the AA will file a notification with the Office of the Federal Register, at or near the beginning of the following fishing year to reduce the ACL for that following year by the amount of the ACL overage in the prior fishing year, and reduce the ACT, as determined in paragraph (a)(4)(ii)(B), by the amount of the ACL overage in the prior fishing year, unless the best scientific information available determines that a greater, lesser, or no overage adjustment is necessary.

(D) The applicable recreational ACLs for gag, in gutted weight, are 1.232 million lb (0.559 million kg) for 2012, 1.495 million lb (0.678 million kg) for 2013, 1.720 million lb (0.780 million kg) for 2014, and 1.903 million lb (0.863 million kg) for 2015 and subsequent fishing years. The recreational ACTs for gag, in gutted weight, are 1.031 million lb (0.468 million

kg) for 2012, 1.287 million lb (0.584 million kg) for 2013, 1.519 million lb (0.689 million kg) for 2014, and 1.708 million lb (0.775 million kg) for 2015 and subsequent fishing years.

(5) * * *

(ii) * * *

(B) Without regard to overfished status, and in addition to the measures specified in paragraph (a) (5) (ii) (A) of this section, if red grouper recreational landings, as estimated by the SRD, exceed the applicable ACL specified in paragraph (a) (5) (ii) (D) of this section, the AA will file a notification with the Office of the Federal Register to maintain the red grouper ACT, specified in paragraph (a) (5) (ii) (D) of this section, for that following fishing year at the level of the prior year's ACT, unless the best scientific information available determines that maintaining the prior year's ACT is unnecessary. In addition, the notification will reduce the bag limit by one fish and reduce the length of the recreational red grouper fishing season the following fishing year by the amount necessary to ensure red grouper recreational landings do not exceed the recreational ACT in the following fishing year. The minimum red grouper bag limit for 2014 and subsequent fishing years is two fish.

(C) If red grouper are overfished, based on the most recent Status of U.S. Fisheries Report to Congress, and red grouper

recreational landings, as estimated by the SRD, exceed the applicable ACL specified in paragraph (a)(5)(ii)(D) of this section, the following measures will apply. In addition to the measures specified in paragraphs (a)(5)(ii)(A) and (B) of this section, the AA will file a notification with the Office of the Federal Register, at or near the beginning of the following fishing year to reduce the ACL for that following year by the amount of the ACL overage in the prior fishing year, and reduce the ACT, as determined in paragraph (a)(5)(ii)(B), by the amount of the ACL overage in the prior fishing year, unless the best scientific information available determines that a greater, lesser, or no overage adjustment is necessary.

(D) The recreational ACL for red grouper, in gutted weight, is 1.90 million lb (0.862 million kg) for 2012 and subsequent fishing years. The recreational ACT for red grouper, in gutted weight, is 1.730 million lb (0.785 million kg) for 2012 and subsequent fishing years.

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